

BRB No. 98-0675 BLA

JESSE E. MURPHY)
)
 Claimant-Petitioner)
)
 v.)
)
 DIRECTOR, OFFICE OF WORKERS') DATE ISSUED:
)
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Respondent) DECISION and ORDER

Appeal of the Supplemental Decision and Order Denying Attorney Fees and the Decision On Reconsideration of Order Denying Attorney Fees of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

Harold B. Culley, Jr. (Culley & Wissore), Raleigh, Illinois, for claimant.

Michelle S. Gerdano (Henry L. Solano, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Supplemental Decision and Order Denying Attorney Fees and the Decision On Reconsideration of Order Denying Attorney Fees (96-BLA-0496) of Administrative Law Judge Gerald M. Tierney denying claimant's original counsel's request for attorney fees filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). Originally, in a Decision and Order issued on July 29, 1997, the administrative law judge awarded claimant benefits on modification pursuant to

20 C.F.R. §725.310, noting that the existence of pneumoconiosis had been previously established and was not at issue on modification.¹ An appeal by the

¹Claimant originally filed a Part B claim with the Social Security Administration on June 11, 1973, Director's Exhibit 1. Harold B. Culley, Jr., was appointed to represent claimant on August 2, 1983, Director's Exhibit 36. In a Decision and Order issued on November 14, 1986, Administrative Law Judge Philip J. Lesser adjudicated the claim pursuant to 20 C.F.R. §727.203. Director's Exhibit 41. Judge Lesser found the existence of pneumoconiosis established by the x-ray evidence and, therefore, found that the interim presumption was invoked pursuant to 20 C.F.R. §727.203(a)(1). However, Judge Lesser found that rebuttal of the interim presumption was established pursuant to 20 C.F.R. §727.203(b)(2) and denied benefits. On appeal, the Board affirmed Judge Lesser's finding pursuant to Section 727.203(a)(1), but vacated his finding pursuant to Section 727.203(b)(2) and remanded the case for reconsideration, Director's Exhibit 43. *Murphy v. Director, OWCP*, BRB No. 87-0226 BLA (Oct. 31, 1988)(unpub.).

Director, Office of Workers' Compensation Programs [the Director], was dismissed by the Board, *Murphy v. Director, OWCP*, BRB No. 97-1654 BLA (Oct. 16, 1997)(Order)(unpub.), and the award became final. 20 C.F.R. §§725.479; 802.406.

Subsequently, claimant's original counsel, Mr. Culley, submitted a fee petition to the administrative law judge, requesting a fee for services he provided representing claimant before the Office of Administrative Law Judges prior to the final award of benefits, from July 18, 1985 through February 8, 1990. The administrative law judge noted that it was not until after claimant appointed new counsel in conjunction with his pursuit of benefits on modification that benefits were awarded. Thus, the administrative law judge concluded that Mr. Culley did not secure an economic benefit for claimant which meets the requirement of a successful prosecution and in fact found that Mr. Culley's representation resulted in a denial of benefits. Consequently, the administrative law judge determined that the fact that claimant was ultimately successful in establishing his entitlement to benefits does not entitle Mr. Culley to an award of attorney fees. On reconsideration, the administrative law judge reaffirmed his denial of Mr. Culley's fee petition. Although the administrative law judge noted that the Board had awarded Mr. Culley fees for his services rendered before the Board in this case, the administrative law judge

In a Decision and Order On Remand issued on February 5, 1990, Administrative Law Judge G. Marvin Bober found rebuttal of the interim presumption established pursuant to 20 C.F.R. §727.203(b)(3) and that entitlement under 20 C.F.R. Part 718 was not established and, therefore, denied benefits. Director's Exhibit 45. On appeal, the Board ultimately affirmed the denial of benefits on reconsideration, Director's Exhibits 46-47. *Murphy v. Director, OWCP*, BRB No. 87-0226 BLA (Aug. 10, 1994)(Order)(unpub.). Mr. Culley represented claimant up to the time of the Board's August, 1994, Order. Subsequently, Sandra M. Fogel was appointed to represent claimant on November 30, 1994, and filed a request for modification on May 19, 1995, Director's Exhibit 48.

concluded that it was “not clear whether the Board was aware that [Mr. Culley] was a former attorney, and not the attorney who ultimately was successful in obtaining an award of benefits on modification,” see Decision On Reconsideration of Order Denying Attorney Fees.

On appeal, claimant’s original counsel, Mr. Culley, contends that the administrative law judge erred in failing to award him attorney fees merely because he was not representing claimant at the time of the final award of benefits. The Director has filed a Motion to Remand in response to this appeal, urging the Board to vacate the administrative law judge’s determination and remand the case for reconsideration.

The standard of review for the Board in analyzing an appellant's arguments on appeal of an attorney fee determination is whether the determination is arbitrary, capricious or an abuse of discretion, see *Abbott v. Director, OWCP*, 13 BLR 1-15 (1989), citing *Marcum v. Director, OWCP*, 2 BLR 1-894 (1980). All fee petitions must be filed with, and approved by, the adjudicating officer or tribunal before whom the services were performed. 20 C.F.R. §§725.365; 725.366(a); see *Abbott, supra*; *Helmick v. Director, OWCP*, 9 BLR 1-161 (1986); *Vigil v. Director, OWCP*, 8 BLR 1-99 (1985). The adjudicating officer must discuss and apply the regulatory criteria at 20 C.F.R. §725.366 in determining the fee award due, if any. See *Lenig v. Director, OWCP*, 9 BLR 1-147 (1986).

Claimant’s original counsel, Mr. Culley, requested a fee of \$4,387.50 for 29.25 hours of services at an hourly rate of \$150.00. No objection to Mr. Culley’s fee petition is found in the record.² Claimant’s original counsel contends that he was at least, in part, responsible for the successful prosecution of this claim, noting that the existence of pneumoconiosis, a necessary element of entitlement, was established during the time that he represented claimant. Moreover, claimant’s original counsel notes that the appeal he initiated of the original denial of benefits by Judge Lesser precluded the final denial of benefits and, thereby, kept the option open for claimant to pursue benefits on modification under Section 725.310, as opposed to seeking benefits pursuant to the tougher avenue to entitlement provided by filing a new, duplicate claim under 20 C.F.R. §725.309. See generally *Broughton v. Director, OWCP*, 13 BLR 1-35 (1989). Finally, claimant’s original counsel notes that the Board awarded him attorney fees for the services he rendered before the Board in

²Mr. Culley has already been awarded attorney fees for services he provided claimant in this claim before both the district director and the Board. See *Murphy v. Director, OWCP*, BRB Nos. 87-0226 BLA and 90-0649 BLA (Sept. 30, 1997)(Order)(unpub.).

this claim.

The Director contends that the administrative law judge erred in failing to consider claimant's original counsel's fee petition, noting that nowhere does the relevant statute state that the attorney seeking fees must have been the one to ultimately bring the case to a successful conclusion, but rather states that the attorney simply must have provided service involving a claim which is ultimately and finally approved, see 30 U.S.C. §928, as incorporated into the Act by 30 U.S.C. §932(a). Moreover, the Director notes that as modification is merely a continuation of the same claim, see 20 C.F.R. §725.310, claimant's original counsel's services pursuing the same claim prior to modification may have been necessary to obtaining benefits on modification. Thus, the Director urges that the case be remanded for consideration of Mr. Culley's fee petition.

In order for counsel to receive compensation for legal services performed on a claimant's behalf, there must be a successful prosecution of the claim. 33 U.S.C. §928(a), as incorporated by 30 U.S.C. §932(a); see *Yates v. Harman Mining Corp.*, 12 BLR 1-175 (1989), *reaff'd on recon. en banc*, 13 BLR 1-56 (1989); *Markovich v. Bethlehem Mines Corp.*, 11 BLR 1-105 (1987), *i.e.*, any award of attorney fees does not become enforceable and payable until such time as an award of benefits becomes final and reflects successful prosecution of the claim, see *Coleman v. Ramey Coal Co.*, 18 BLR 1-9 (1993). Counsel is entitled to fees for all necessary services rendered on behalf of the claimant at each level of the adjudicatory process, even if he was unsuccessful at a particular level, so long as the claimant is ultimately successful in prosecuting the claim, 33 U.S.C. §928(a), as incorporated by 30 U.S.C. §932(a); see generally *Clark v. Director, OWCP*, 9 BLR 1-211 (1986), *overruled on other grounds by Brodhead v. Director, OWCP*, 17 BLR 1-138 (1993). The standard test for the administrative law judge to consider in determining whether the services performed by the attorney were necessary is whether the attorney, at the time the work was performed, could reasonably regard the work as necessary to the establishment of entitlement, see *Lanning v. Director, OWCP*, 7 BLR 1-314 (1984).

An award of benefits on modification affords the claimant the economic benefit requisite to a successful prosecution of a claim, see *Brodhead, supra* (where the Board awarded attorney fees for services performed before the Board on an appeal ultimately dismissed in light of the claimant's subsequent and, ultimately, successful pursuit of an award of benefits on modification); see also *Markovich, supra*. Moreover, although claimant's claim was originally denied when considered by both Judge Lesser and Judge Bober, at the time that Mr. Culley represented claimant as claimant's original counsel, he could reasonably have regarded the work he performed before the Office of Administrative Law Judges as necessary for the

successful prosecution of the claim at the time the work was performed and the work was relevant to claimant's success in obtaining benefits, see *Brodhead, supra*; *Lanning, supra*. Hence, as claimant was ultimately successful in establishing entitlement, claimant's original counsel may properly be awarded attorney fees for services he rendered before the Office of Administrative Law Judges.

Consequently, inasmuch as the administrative law judge failed to discuss and apply the regulatory criteria at 20 C.F.R. §725.366 in determining the fee award due to claimant's original counsel, if any, see *Lenig, supra*, we vacate the administrative law judge's Supplemental Decision and Order Denying Attorney Fees and the Decision On Reconsideration of Order Denying Attorney Fees as arbitrary, capricious and an abuse of discretion, see *Abbott, supra*, and remand the case for the administrative law judge to reconsider claimant's counsel's petition for attorney fees for services rendered before the Office of Administrative Law Judges pursuant to the regulatory criteria at 20 C.F.R. §725.366, see *Lenig, supra*.

Accordingly, the administrative law judge's Supplemental Decision and Order Denying Attorney Fees and the Decision On Reconsideration of Order Denying Attorney Fees are vacated and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

Deskbook Sections: Part XI.A.4 - Successful Prosecution of the Claim and Part XI.A.10 - Miscellaneous Issues.

Although the claim had been originally denied at the time that counsel represented claimant and counsel was not representing claimant at the time of a subsequent final award of benefits, since claimant was ultimately successful in establishing entitlement when represented by a subsequent counsel, claimant's original counsel may properly be awarded attorney fees for services rendered before the final award of benefits as he could reasonably have regarded the work he performed as necessary for the successful prosecution of the claim at the time the work was performed and the work was relevant to claimant's success in obtaining benefits, see *Murphy v. Director, OWCP*, BLR , BRB No. 98-0675 BLA (Feb. 11, 1999).